

United States

Vol 1847

Circuit Court of Appeals

For the Ninth Circuit.

THE FIRST NATIONAL BANK OF KELSO,
WASHINGTON, a Corporation, by E. B.
BENN, Its Receiver,

Appellant,

J. G. GRUVER, and THE AMERICAN SURETY
COMPANY OF NEW YORK, a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division.

FILED
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PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

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THE FIRST NATIONAL BANK OF KELSO,
WASHINGTON, a Corporation, by E. B.
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vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Kelso, Washington.

J. E. STONE,
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JOHN H. DUNBAR,
Attorney General, State of Wash.,
Olympia, Washington.

LESTER T. PARKER,
Assistant Attorney General,
State of Washington,
Olympia, Washington.

In the United States District Court for the Western
District of Washington, Southern Division.

No. 8261

THE FIRST NATIONAL BANK OF KELSO,
WASHINGTON, a corporation, by E. B.
BENN, its Receiver,
Plaintiff,

vs.

J. G. GRUVER, and THE AMERICAN SURETY
COMPANY OF NEW YORK, a corporation,
Defendant.

COMPLAINT.

COMES NOW the plaintiff and for cause of action herein, alleges:

1. That the First National Bank of Kelso, Washington is a corporation duly organized and existing under and by virtue of the national banking laws of the United States of America and has for many years been engaged in the business of banking at the City of Kelso, in Cowlitz County, State of Washington.

2. That on the 23rd day of December, 1931, by action of the Board of Directors of said bank said bank was closed and placed in charge of the Comptroller of Currency of the United States. That on the 29th day of December, 1931, E. B. Benn was by the Comptroller of Currency of the United States of America, duly appointed Receiver of said The First National Bank of Kelso, Washington, and immediately qualified as such receiver and took possession of said bank and its assets and property, and is now the regularly appointed, qualified and acting Receiver for said bank.

3. That plaintiff brings this action in the United States District Court above named for the reason that said bank is now being liquidated by order, direction and authority of the Comptroller of Currency of the United States and by the Receiver herein named duly appointed and qualified.

4. That during all of the times hereinafter mentioned the defendant, J. G. Gruver was and now is the regularly elected qualified and acting Auditor

of Cowlitz County, State of Washington. [1*]

5. That on December 16th, 1930, the said J. G. Gruver as such Auditor filed in the office of the County Auditor of Cowlitz County, Washington, his official bond in the sum of Ten Thousand and no/100 (\$10,000.) Dollars, said bond having been signed as surety by The American Surety Company of New York, a corporation, engaged in the business of executing surety bonds and which is qualified to execute such bonds in the State of Washington. That said bond was duly approved by the Prosecuting Attorney of Cowlitz County, Washington, and by the Board of County Commissioners of said County and has not been revoked in any manner.

6. That on the date when said bank was closed it had on deposit with said J. G. Gruver as County Auditor of Cowlitz County, Washington, certain school warrants the total amount of said warrants being the sum of One Thousand Five Hundred Three & 98/100 (\$1503.98) Dollars; that said warrants were deposited with said County Auditor under the authority of the laws of the State of Washington as security for such money as from time to time might be deposited by said County Auditor from funds belonging to Cowlitz County, State of Washington, and not otherwise.

7. That at the time of closing said bank the said J. G. Gruver, County Auditor, had on deposit in said bank funds belonging to the State of Washington, in the sum of Fifty-seven & 71/100 (\$57.71) Dollars,

*Page numbering appearing at the foot of page of original certified Transcript of Record.

with interest thereon amounting to Seventy Cents (70¢), making a total of Fifty-eight & 41/100 (\$58.41) Dollars. That immediately following the closing of said bank the said J. G. Gruver acting as Auditor of Cowlitz County, Washington, sold the said school warrants on deposit with him as above set forth, receiving therefor the sum of One Thousand Five Hundred Sixty-eight & 59/100 (\$1568.59) Dollars, and has failed, refused and neglected to deliver to said bank and its Receiver the amount of money [2] represented by the difference between said deposit and the proceeds of the sale of said warrants in the sum of One Thousand Five Hundred Ten & 18/100 (\$1510.18) Dollars. That said Receiver herein has made demand upon said defendant J. G. Gruver for the payment of said sum of money, which demand has been denied and refused.

8. That the Receiver herein has been duly authorized and directed by the Comptroller of Currency of the United States to institute in this court an action for the recovery of said sum of One Thousand Five Hundred Ten & 18/100 (\$1510.18) Dollars.

9. That plaintiff has procured to be entered herein an order authorizing this action to be brought against The American Surety Company of New York, defendant herein.

WHEREFORE, plaintiff prays that it may have judgment against the defendants herein, and each of them, for the sum of One Thousand Five Hundred Ten & 18/100 (\$1510.18) Dollars, and that it may have judgment for its costs and disbursements

herein and for such other and further relief as to the Court may seem just.

Respectfully submitted,
T. P. FISK (Signed)
JOHN F. McCARTHY (Signed)
Attorneys for E. B. Benn, Receiver of
The First National Bank of Kelso.

State of Washington,
County of Cowlitz—ss.

E. B. Benn, being first duly sworn, on oath deposes and says: That he is the Receiver of the First National Bank of Kelso, an insolvent corporation; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

E. B. BENN (Signed)

Subscribed and sworn to before me this 23rd day of March, 1932. [3]

[Notarial Seal] MYRTLE M. DIXON (Signed)
Notary Public in and for the State of Washington,
residing at Kelso.

[Endorsed]: Filed Mar. 24, 1932. Ed. M. Lakin,
Clerk. By E.R., Deputy. [4]

[Title of Court and Cause.]

ANSWER OF DEFENDANT J. G. GRUVER

Comes now the defendant, J. G. Gruver, and for answer to the plaintiff's complaint, admits, denies and alleges.

I.

This defendant admits each and every allegation contained in paragraphs I, II, III, IV, V, VIII and IX of said complaint.

II.

Answering paragraph VI of said complaint, this defendant admits that on the 23rd day of December, 1931, when the First National Bank of Kelso closed, he had certain school warrants, amounting to the sum of \$1,503.98, belonging to said bank which had been deposited with said defendant by said bank, but denies that said warrants had been deposited as security only for funds belonging to Cowlitz County and instead alleges that said warrants had been deposited with him for the purpose of securing him from loss for any funds lawfully deposited by him in said bank which might come into his hands by virtue of his office as auditor of Cowlitz County, Washington.

III.

Answering paragraph VII of said complaint, this defendant denies each and every allegation therein contained, except as hereinafter expressly admitted.

For further answer, affirmative defence and set off, this defendant alleges:

I.

That under and by virtue of the statutes of the state of Washington, and particularly section 6314, Rem. Comp. Stat., this defendant as auditor of Cowlitz County is required to receive applications and fees for Washington state motor vehicle licenses;

that on December 21st, 1931, this defendant as such county auditor had received fees from such motor vehicle licenses aggregating the sum of \$833.00; that said [5] fees were in the form of cash, currency and checks drawn on various banks; that on said day he deposited the said sum of \$833.00 in cash, currency and checks in the said First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew two certain drafts payable to the treasurer of the State of Washington and drawn on the First National Bank of Seattle, Washington, one draft No. 2599, for the sum of \$533.00 and one draft No. 2600, for the sum of \$300.00; and that said drafts were immediately mailed to the state treasurer of the state of Washington.

II.

That under and by virtue of the statutes of the state of Washington, and particularly section 41, Chapter 178, Laws Extraordinary Session 1925, this defendant as auditor of Cowlitz County during the period between December 1st, 1931, and December 17th, 1931, issued one hunting and fishing license for Clark County, Washington, and received therefor the sum of \$1.50, and issued six hunting and fishing licenses for Skamania County, Washington, and received therefor the sum of \$9.00; that on the 17th day of December, 1931, he deposited the receipts of said sales, to-wit: \$10.50 in cash in the First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew one draft No. 2590 payable to the auditor of Skamania County, Washington, for the sum of \$9.00 on the First Na-

tional Bank of Seattle, Washington, and one draft No. 2587 payable to the auditor of said Clark County for the sum of \$1.50 on said First National Bank of Seattle; and that said drafts were immediately mailed to said county auditors of said respective counties.

III.

That before said drafts could be honored and paid in the regular course of business the First National Bank of [6] Kelso closed its doors and a national bank examiner was placed in charge; that said drafts were dishonored by the First National Bank of Seattle, were returned to the said several payees thereof not paid and by said payee returned to this defendant; that this defendant was required to and did immediately pay to the state treasurer of the state of Washington the said sum of \$833.00, to the auditor of Clark County the sum of \$1.50, and to the auditor of Skamania County sum of \$9.00, making a total sum of \$843.50 for all of said drafts; that this defendant still holds said drafts, which have not been paid by the said First National Bank of Kelso.

IV.

That on the 23rd day of December, 1931, when the First National Bank of Kelso closed, this defendant, as county auditor had a further deposit in said bank in the sum of \$54.71; that the total amount of said deposit and said drafts aggregated \$898.21.

V.

That on the 28th day of December, 1931, this defendant presented the said warrants to the county

treasurer of Cowlitz County, Washington, for payment and received therefore their face value and accumulated interest to date of said payment which amounted to sum of \$1,568.59; that at the time of the payment of the said warrants this defendant did not know that the said drafts drawn in favor of the auditors of Clark and Skamania Counties, described as aforesaid, had been dishonored, whereupon this defendant tendered to the examiner in charge of the First National Bank of Kelso the sum of \$680.88, the same being the difference between the amount received by this defendant from the payment of said warrants and the amount of defendant's deposit with said bank as determined by this defendant at that time. That the examiner [7] in charge refused to accept said sum of \$680.88 and the receiver of said bank, plaintiff herein, has also refused to accept said amount; that this defendant has at all times been ready and willing to pay to the receiver of said bank the difference between the amount of his deposits and outstanding drafts as aforesaid and the amount received from the payment of said warrants which is the sum of \$670.38, which amount this defendant tenders at this time and pays the same into the registry of this court herewith.

VI.

That the First National Bank of Kelso, by and through its officers, knew that said school warrants were deposited with this defendant for the purpose of securing him from loss by reason of any public funds deposited by him in said bank by virtue of his

office as said auditor of Cowlitz County, Washington, and particularly motor vehicle license fees collected by this defendant; and that all of said moneys were public moneys lawfully coming into the hands of this defendant as a public officer.

And for further answer, affirmative defence and set off, this defendant alleges:

I.

That all of said money deposited by this defendant in the First National Bank of Kelso for which drafts as aforesaid were issued by that bank in favor of the treasurer of the state of Washington and in favor of the auditor of Skamania County, Washington, and in favor of the auditor of Clark County, Washington, increased the assets of said First National Bank by the amount of said drafts and came into the possession of the national bank examiner, who took possession of said bank on the 23rd day of December, 1931, and thereafter into the possession of the receiver of said bank the plaintiff herein. [8]

II.

That the officers of said First National Bank of Kelso knew that the sum of \$833.00 deposited by this defendant on the 21st day of December, 1931, for which the two drafts in favor of the treasurer of the state of Washington were issued were public funds paid by applicant for motor vehicle licenses; and the officers of said bank also knew the said sum of \$10.50 deposited December 17th, 1931, for which the two drafts were issued in favor of the auditors

of Clark and Skamania counties were public funds paid by applicants for hunting and fishing licenses.

For further answer, affirmative defence and set off, this defendant alleges:

I.

That on the 21st day of December, 1931, at the time this defendant deposited the said sum of \$833 in the First National Bank of Kelso the said bank was insolvent and was known by its officers to be so.

II.

That the amount of said deposit, to-wit: the sum of \$833.00 increased the assets of said bank and has come into the hands of the receiver of said bank, the plaintiff herein.

WHEREFORE, this defendant prays that this action be dismissed and that he recover his costs and disbursements herein.

JOHN H. DUNBAR,

Atty. General.

LESTER T. PARKER,

Asst. Atty. Gen.

CECIL C. HALLIN.

J. E. STONE,

Attorneys for defendant J. G. Gruver.

State of Washington,
County of Cowlitz.—ss.

J. G. Gruver being first duly sworn upon his oath deposes and says: That he is the answering defendant above [9] named, that he has read the foregoing

answer, knows the contents thereof and the same are true as he verily believes.

J. G. GRUVER.

Subscribed and sworn to before me April 8th, 1932.

[Notarial Seal] J. E. STONE,
Notary Public for Washington, residing at Kelso.

Due legal service of foregoing Answer accepted April 9, 1932.

T. L. FISK,
of Attorneys for plaintiff.

[Endorsed]: Filed Apr. 16, 1932. Ed. M. Lakin,
Clerk. By E. R. Deputy. [10]

[Title of Court and Cause.]

ANSWER OF THE AMERICAN SURETY
COMPANY OF NEW YORK, defendant.

Comes now the defendant, The American Surety Company of New York, a corporation, and for answer to the plaintiff's complaint, admits, denies and alleges:

I.

This defendant admits each and every allegation contained in paragraphs I, II, III, IV, V, VIII and IX of said complaint.

II.

Answering paragraph VI of said complaint, this defendant admits that on the 23rd day of December,

1931, when the First National Bank of Kelso closed, defendant J. G. Gruver had certain school warrants, amounting to the sum of \$1,503.98, belonging to said bank which had been deposited with said defendant by said bank, but denies that said warrants had been deposited as security only for funds belonging to Cowlitz County and instead alleges that said warrants had been deposited with said J. G. Gruver for the purpose of securing him from loss for any funds lawfully deposited by him in said bank which might come into his hands by virtue of his office as auditor of Cowlitz County, Washington.

III.

Answering paragraph VII of said complaint, this defendant denies each and every allegation therein, contained, except as hereinafter expressly admitted.

For further answer, affirmative defence and set off, this defendant alleges:

I.

That under and by virtue of the statutes of the state of Washington, and particularly section 6314 Rem. Comp. Stat., the defendant J. G. Gruver as auditor of Cowlitz County is [11] required to receive applications and fees for Washington motor vehicle licenses; that on December 21st, 1931, the defendant J. G. Gruver as such county auditor had received fees from such motor vehicle licenses aggregating the sum of \$833.00; that said fees were in the form of cash, currency and checks drawn on various banks; that on said day he deposited the

said sum of \$833. in cash, currency and checks in the said First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew two certain drafts payable to the treasurer of the state of Washington and drawn on the First National Bank of Seattle, Washington, one draft No. 2599, for the sum of \$533.00 and one draft No. 2600, for the sum of \$300.00; and that said drafts were immediately mailed to the State Treasurer of the state of Washington.

II.

That under and by virtue of the statutes of the state of Washington, and particularly section 41, chapter 178, Laws Extraordinary Session 1925, defendant J. G. Gruver as auditor of Cowlitz County during the period between December 1st, 1931 and December 17th, 1931, issued one hunting and fishing license for Clark County, Washington and received therefor the sum of \$1.50, and issued six fishing and hunting licenses for Skamania County, Washington, and received therefor the sum of \$9.00; that on the 17th day of December, 1931, said auditor deposited the receipts of said sales, to-wit: \$10.50 in cash in the First National Bank of Kelso and as part of the same transaction the First National Bank of Kelso drew one draft for No. 2590 payable to the auditor of Skamania County, Washington, for the sum of \$9.00 on the First National Bank of Seattle, Washington, and one draft No. 2587 payable to the auditor of said Clark County for the sum of \$1.50 on said First National Bank of Seattle; and that

the said drafts [12] were immediately mailed to the said county auditors of said respective counties.

III.

That before said drafts could be honored and paid in the regular course of business the First National Bank of Kelso closed its doors and a national bank examiner was placed in charge; that said drafts were dishonored by the First National Bank of Seattle, were returned to the said several payees thereof not paid and by said payee returned to defendant J. G. Gruver; that defendant J. G. Gruver was required to and did immediately pay to the state treasurer of the state of Washington the said sum of \$833.00, to the auditor of Clark County the sum of \$1.50, and to the auditor of Skamania County sum of \$9.00, making a total sum of \$843.50 for all of said drafts; that defendant J. G. Gruver still holds said drafts, which have not been paid by the First National Bank of Kelso.

IV.

That on the 23rd day of December, 1931, when the First National Bank of Kelso closed, defendant J. G. Gruver, as county auditor of said county had a further deposit in said bank in the sum of \$54.71; that the total amount of said deposit and said drafts aggregated \$898.21.

V.

That on the 28th day of December 1931, defendant J. G. Gruver presented said warrants to the County treasurer of Cowlitz County, Washington,

for payment and received therefor their face value and accumulated interest to date of said payment which amounted to the sum of \$1,568.59; that at the time of the payment of the said warrants the defendant Gruver did not know that the said drafts drawn in favor of the auditors of Clark and Skamania Counties, described as [13] aforesaid, had been dishonored, whereupon defendant J. G. Gruver tendered to the examiner in charge of the First National Bank of Kelso the sum of \$680.88, the same being the difference between the amount received by defendant Gruver from the payment of said warrants and the amount of said defendant Gruver's deposit with said bank as determined by defendant Gruver at that time. That the examiner in charge refused to accept said sum of \$680.88 and the receiver of said bank, plaintiff herein, has also refused to accept said amount; that the defendant Gruver has at all times been ready and willing to pay to the receiver of said bank the difference between the amount of his deposits and outstanding drafts as aforesaid and the amount received from the payment of said warrants which is the sum of \$670.38, which amount defendant J. G. Gruver has payed into the registry of this court for the use and benefit of the plaintiff.

VI.

That the First National Bank of Kelso, by and through its officers, knew that said school warrants were deposited with defendant J. G. Gruver for the purpose of securing him from loss by reason of any public funds deposited by him in said bank by vir-

tue of his office as said auditor of Cowlitz County, Washington, and particularly motor vehicle license fees collected by said defendant Gruver; and that all of said moneys were public moneys lawfully coming into the hands of defendant Gruver as a public officer.

And for further answer, affirmative defence and set off this defendant alleges:

I.

That all of said money deposited by the defendant Gruver in the First National Bank of Kelso for which drafts as aforesaid were issued by that bank in favor of the treasurer of the state of Washington and in favor of the auditors of [14] Skamania County, Washington, and in favor of the auditor of Clark County, Washington, increased the assets of the said First National Bank by the amount of said drafts and came into possession of the national bank examiner, who took possession of said bank on the 23rd day of December, 1931, and thereafter into the possession of the receiver of said bank the plaintiff herein.

II.

The officers of the First National Bank of Kelso knew that the sum of \$833.00 deposited by defendant J. G. Gruver on the 21st day of December 1931, for which the said two drafts in favor of the treasurer of the state of Washington were issued were public funds paid by applicants for motor vehicle licenses; and the officers of said bank also knew the said sum of \$10.50 deposited December 17th, 1931 for which two drafts were issued in favor of the

auditor of Clark and Skamania counties were public funds paid by applicants for hunting and fishing licenses.

And for further answer, affirmative defence and set off, this defendant alleges:

I.

That on the 21st day of December 1931, at the time defendant J. G. Gruver deposited the said sum of \$833.00 in the First National Bank of Kelso the said bank was insolvent and was known by its officers so to be.

II.

That the amount of said deposit, to-wit: the sum of \$833.00 increasing the assets of said bank and has come into the hands of the receiver of said bank, the plaintiff herein.

WHEREFORE, this answering defendant prays that this action be dismissed and that it recover its costs and disbursements herein.

J. E. STONE,

Attorney for defendant The American Surety
Company of New York, a corporation. [15]

State of Washington,
County of King.—ss.

L. H. Melresey being first duly sworn says that he is the agent of the defendant The American Surety Company of New York, a corporation, and makes this verification for and on behalf of the said The American Surety Company of New York; that he has read the foregoing Answer, knows the con-

tents thereof, and the same are true as he verily believes.

L. H. MELRESEY.

Subscribed and sworn to before me April 19, 1932.

[Seal] CARL L. RANDALL,
Notary Public for Washington, residing at Seattle.

[Endorsed]: Filed Apr. 23, 1932. Ed. M. Lakin,
Clerk. By E. W. Pettit, Deputy. [16]

[Title of Court and Cause.]

REPLY TO ANSWER OF DEFENDANT
J. G. GRUVER.

Comes now the plaintiff and in reply to the first affirmative defense set forth in the answer of the defendant J. G. Gruver admits, denies and alleges, as follows:

1. Plaintiff denies each and every allegation contained in said affirmative defense, except as alleged in the complaint herein and except as hereinafter expressly admitted.

2. Plaintiff admits that on the 21st day of December, 1931, the defendant J. G. Gruver, purchased from the First National Bank of Kelso two certain drafts payable to the Treasurer of the State of Washington and drawn on the First National Bank of Seattle, Washington, one of said drafts being for the sum of \$533.00 and the other being for the sum of \$300.00.

3. Plaintiff admits that on the 17th day of De-

ember, 1931, the defendant, J. G. Gruver, purchased from the First National Bank of Kelso, Washington, a draft on the First National Bank of Seattle, Washington, payable to the auditor of Skamania County, Washington, for the sum of \$9.00 and that said defendant also purchased from said bank on said day a draft drawn on The First National Bank of Seattle, Washington, payable to the Auditor of Clark County, Washington, for the sum of \$1.50.

In Reply to the Second and Third Affirmative Defenses set forth in the answer of said defendant, plaintiff denies each and every allegation contained in said affirmative defenses and each of them, except as alleged in the complaint herein.

WHEREFORE, plaintiff prays that it have judgment against defendants in accordance with the demands of its complaint.

FISK & McCARTHY,
Attorneys for plaintiff,
By JOHN F. McCARTHY,
Of Counsel. [17]

State of Washington,
County of Cowlitz.—ss.

E. B. Benn, being first duly sworn, on oath deposes and says: That he is the Receiver of the First National Bank of Kelso, an insolvent corporation; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

E. B. BENN.

Subscribed and sworn to before me this 26th day of April, 1932.

[Seal] MYRTLE M. DIXON,
Notary Public in and for the State of Washington,
residing at Kelso.

[Endorsed]: Filed Apr. 26, 1932. Ed. M. Lakin,
Clerk. By E. R., Deputy. [18]

[Title of Court and Cause.]

REPLY TO ANSWER OF DEFENDANT,
THE AMERICAN SURETY OF NEW YORK.

Comes now the plaintiff and in reply to the first affirmative defense set forth in the answer of the defendant The American Surety Company of New York, a corporation admits, denies and alleges, as follows:

1. Plaintiff denies each and every allegation contained in said affirmative defense, except as alleged in the complaint herein and except as hereinafter expressly admitted.

2. Plaintiff admits that on the 21st day of December, 1931, the defendant J. G. Gruver, purchased from the First National Bank of Kelso two certain drafts payable to the Treasurer of the State of Washington and drawn on the First National Bank of Seattle, Washington, one of said drafts being for the sum of \$533.00 and the other being for the sum of \$300.00.

3. Plaintiff admits that on the 17th day of De-

cember, 1931, the defendant, J. G. Gruver, purchased from the First National Bank of Kelso, Washington, a draft on the First National Bank of Seattle, Washington, payable to the auditor of Skamania County, Washington, for the sum of \$9.00 and that said defendant also purchased from said bank on said day a draft drawn on The First National Bank of Seattle, Washington, payable to the Auditor of Clark County, Washington, for the sum of \$1.50.

In Reply to the Second and Third Affirmative Defenses set forth in the answer of said defendant, plaintiff denies each and every allegation contained in said affirmative defenses and each of them, except as alleged in the complaint herein.

WHEREFORE, plaintiff prays that it have judgment against defendants in accordance with the demands of its complaint.

FISK & McCARTHY,
Attorneys for Plaintiff,
By JOHN F. McCARTHY,
Of Counsel. [19]

State of Washington,
County of Cowlitz.—ss.

E. B. Benn, being first duly sworn, on oath deposes and says: That he is the Receiver of the First National Bank of Kelso, an insolvent corporation; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

E. B. BENN.

Subscribed and sworn to before me this 26th day of April, 1932.

[Notarial Seal] MYRTLE M. DIXON,
Notary Public in and for the State of Washington,
residing at Kelso.

[Endorsed]: Filed Apr. 26, 1932. Ed. M. Lakin,
Clerk. By E. R., Deputy. [20]

In the United States District Court, Western Dis-
trict of Washington, Southern Division.

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 7th day of October, 1932, the Hon. Edward E. Cushman, U. S. District Judge, presiding, among other proceedings had were the following, taken and copied from the minute record of said Court:

No. 8261

First National Bank of Kelso

By E. B. Benn, its Receiver,

Plaintiff,

vs.

J. G. Gruver and American Surety Co. of New
York,

Defendants.

RECORD OF TRIAL.

On this 7th day of October, 1932, this cause comes on for trial, Thos. McCarthy appearing for plain-

tiff and J. E. Stone and Cecil Hallin appearing as attorneys for defendants. Upon oral stipulation jury is waived. [21]

[Title of Court and Cause.]

MEMORANDUM DECISION AFTER TRIAL.

Where the words "the bank" are used in this decision The First National Bank of Kelso, Washington, is intended.

Plaintiff, receiver of the bank, sues the auditor of Cowlitz County and his bondsman to recover money received by the auditor in payment of certain school warrants deposited by the bank with the auditor as security.

Plaintiff alleges that the warrants were deposited as security for such money or funds belonging to Cowlitz County as from time to time might be deposited by the auditor in the bank. [22]

Defendants allege that the warrants were deposited for the purpose of securing the auditor for any public funds deposited by him as auditor.

Under written stipulation the cause was tried to the Court without a jury.

The defendants concede that the facts are substantially as stated in plaintiff's brief as follows:

* * * * *

"The defendant in the course of his duties as County Auditor is required to and does collect certain monies belonging to Cowlitz County consisting of marriage license fees and fees for

hunting and fishing licenses for that county. As far as the record shows, these monies are the only monies belonging to Cowlitz County which the defendant retains in his possession; * * *

The defendant is also required to, and does, receive applications for motor vehicle licenses from the State of Washington, and in behalf of the State collects the fees for such licenses at the time the applications are made. In addition to the amount of the license fees, the Auditor charges a fee of twenty-five cents for each application and this additional fee belongs to the county and is turned over to the County Treasurer. In receiving applications and collecting the fees for motor vehicle license the defendant acts as a collection agency for the State and the funds so received by him belong to the State of Washington and are remitted daily to the State Treasurer.

The defendant also issues hunting and fishing licenses for other counties and the fees received for such licenses belong to such other counties and are remitted at varying intervals. In cases where the funds received for such licenses are not remitted immediately the same are held in the office of the County Auditor until the remittance is made.

At the times involved in this action the defendant had two checking accounts in the plaintiff bank, one called the "trust fund" account, in which only monies received from marriage license fees were deposited and the other called

the "game fund" account, in which only funds received from hunting and fishing licenses for Cowlitz County were deposited. These two accounts are the only accounts which the defendant ever had in the bank.

The record shows that for a period of at least six months prior to the closing of the bank it was the custom of the defendant to make the remittances of automobile license fees to the State Treasurer by [23] drafts drawn by the plaintiff bank on the First National Bank of Seattle, and that the remittances to other counties for hunting and fishing licenses issued for such other counties were likewise made by drafts drawn by the plaintiff bank upon other banks. These drafts were in every instance purchased by the defendant and paid for in cash" (currency, silver and checks) "at the time the same were issued. The record shows that in no instance were any of such drafts purchased or paid for out of the funds which had been on deposit in the bank, and in no instance were any of the motor vehicle license funds or outside county fishing license funds ever deposited in the bank, unless it could be said that the mere payment" ('delivery', rather than the words 'mere payment' would be more descriptive of this act) "of these funds to the bank in exchange for the drafts mentioned would constitute a deposit of the same.

The record shows that during the period from April 1st, 1931 to October 1st, 1931, the daily

balance in the game fund account amounted to from \$800.00 to \$1800.00, and that the average daily balance in the trust fund account amounted to \$30.00 or \$40.00.

On the 9th day of April, 1931, the bank turned over to the defendant certain school warrants of the total face value of \$1503.98, and the terms and conditions under which such school warrants were turned over to the defendant are set forth in a written instrument which reads as follows:—

Office of
J. G. Gruver
County Auditor
Court House,

Kelso, Washington.

April 9th, 1931.

RECEIVED of The First National Bank, Kelso, Washington, as security for Cowlitz County funds deposited by me, and to be deposited by me, in such bank, various School District warrants as follows:

School Dist.	Warrant No.	Bank's No.	Amount
127	6	2119	\$125.00
127	10	2123	123.00
127	16	2122	175.00
127	17	2125	143.00
127	26	2130	150.00
127	29	2137	123.00
127	34	2132	100.25
127	40	2153	116.75
127	47	2120	111.00
127	54	2126	87.75

School Dist.	Warrant	Bank's	
No.	No.	No.	Amount
127	64	2146	99.00
127	67	2124	99.00
127	81	2121	10.00
127	108	2151	41.23

TOTAL — Fifteen Hundred Three & 98/100
Dollars \$1,503.98
[24]

Dated at Kelso, Washington, April 9th, 1931.
(Sig.) J. G. Gruver County Auditor.'

On December 17th, 1931, the defendant purchased from the plaintiff bank a draft on The First National Bank of Seattle for the sum of \$10.50, payable to the Auditor of Skamania County, Washington, and a similar draft for the sum of \$1.50, payable to the Auditor of Clark County, Washington. These drafts were paid for in cash and represented funds received by the defendant for hunting and fishing licenses issued by him for Skamania and Clark counties, respectively.

On December 21st, 1931, the defendant had on hand the sum of \$833.00 in the form of cash, "(silver) "currency and checks which had been received by him in payment of automobile license fees for the State of Washington and on that day he purchased from the plaintiff bank two drafts drawn on The First National Bank of Seattle and payable to the Treasurer of the State of Washington, one being for the sum of

\$533.00 and the other for the sum of \$300.00. These drafts were paid for by the defendant with the cash," (silver) "currency and checks above referred to. At the time the various drafts herein mentioned were issued the plaintiff bank had sufficient funds or credit in The First National Bank of Seattle to pay the same upon presentation and the same would have been paid had it not been for the closing of the plaintiff bank prior to the time the drafts were presented for payment." (That is, there would have been sufficient funds in The First National Bank of Seattle for a draft upon a Portland bank payable to the First National Bank of Seattle then in the mails to have been paid, which it was not.)

"The record shows that the last date on which plaintiff bank did business was December 22nd, 1931, and that the Comptroller of the Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation. At the time of the closing of the bank as aforesaid the defendant had on deposit in the bank in the trust fund account and in the game fund account a total balance of \$57.71, together with interest thereon amounting to 70¢, making a total of \$58.41.

After the closing of the plaintiff bank and on or about the 28th day of December, 1931, the defendant sold the school warrants which had been deposited with him, receiving in payment therefor the sum of \$1568.59, and after deducting

therefrom the amount represented by the balance of his deposit in the trust fund and game fund, together with the amount of the drafts above referred to, tendered the balance amounting to \$680.38 to the Examiner in Charge of the plaintiff bank. This tender was refused by the Examiner and demand was made upon the defendant for the sum of \$1510.18, the same being the balance of the proceeds of said warrants, after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of the bank. After the commencement of this action the [25] defendant tendered into court the sum of \$680.38 and the same has been paid to the plaintiff under the terms of a stipulation in which it is agreed that the acceptance of the same should" (not) "prejudice the plaintiff's right to recover any additional sum which the Court may find owing to the plaintiff in this action."

The funds received from the auditor by the bank were immediately co-mingled with the bank's other funds.

PLAINTIFF cites: Cohn vs. Dunn, 70 A. L. R. page 740; Van Doren R. & C. Co. vs. Guardian Gas & G. Co., 99 Wash. 68; 21 R. C. L. p. 653; 49 C. J. 936; 49 C. J. 942; Reynes vs. Dumont, 130 U. S. 354; Armstrong vs. Chemical Bank, 41 Fed. 234; Scott vs. Armstrong, 146 U. S. 499; 57 Corpus Juris 396; 57 Corpus Juris, 421; 57 Corpus Juris 426;

Mansfield vs. Yates-American Machine Co., 153 Wash. 345; *In re Bevins*, 165 Fed. 434; Fidelity & Deposit Co. vs. Haines, 23 L. R. A. 652; United States Fidelity & Guaranty Company vs. Woll-dridge, 268 U. S. 234; 34 CYC 194; *Quin vs. Earle*, 95 Fed. 728; *Charles T. Cherry vs. Territory of Ok-lahoma*, 8 L. R. A. (N.S.) 1254.

DEFENDANTS cite: *Morse on Banks and Banking*, Vol. 3, p. 316; *Leach vs. City Commercial Savings Bank of Mason City*, 212 N. W. 746; *Stan-dard Oil Co. vs. Veigel*, 219 N. W. 863; *Leach vs. Battle Creek Savings Bank*, 211 N. W. 527; *Spiro-plos vs. Scandinavian-American Bank*, 116 Wash. 491, 16 A. L. R. 181; *State ex rel. Kern & Kibbe vs. Hinton*, 68 Wash. Dec. 156; *Morse on Banks and Banking*, Vol. 3, p. 322; *State of South Dakota vs. Fiman*, 29 Fed. (2d) 770; *Remington's Compiled Statutes of Washington*, Section 5548, as amended by chapter 304, *Laws of Washington*, 1921; *State of South Dakota vs. Fiman*, 29 Fed. (2d) 770, certi-orari denied, 279 U. S. 845; *City of Macon vs. Far-mer's Trust Co.*, 29 S. W. (2d) 643; *State vs. Page Bank of St. Louis County*, 14 S. W. (2d) 597; *Rem-ington's Compiled Statutes of Washington*, Sec-tions 265 and [26] 266; *Frick et al. vs. Clements, et al.*, 31 Fed. 542; *Charney vs. Sidley*, 73 Fed. 980; *Dotson vs. Kirk*, 180 Fed. 14; *Payne vs. Clark*, 271 Fed. 525; *Woodlawn Farm Dairy Co. vs. Erie R.R. Co.*, 282 Fed. 278; *Longsdorf Cyclopedia of Federal Procedure*, Vol. 2, page 597.

CUSHMAN, District Judge:

It will not be necessary herein to discuss all of the points argued in the briefs. The discussion will be confined to two matters: First, were the funds exchanged by the auditor for drafts upon the Seattle bank for transmittal to the State Treasurer and auditors of other counties "Cowlitz County funds"? Second, did the delivery of such funds to the bank in exchange for such drafts constitute a "deposit" in the bank?

The provisions of the Washington law touching the oath, bond, general duties and fee bill of county auditors are set forth in Sections 4083 to 4105 of Remington's Revised Statutes of Washington.

The auditor is a salaried officer and his fees are paid to the County Treasurer on the first Monday of each month. Section 4217, Remington's Revised Statutes of Washington.

The duties of the auditor in relation to the collection of money on account of automobile license applications are defined in Section 6317, Remington's Compiled Statutes of Washington * * * those in relation to hunting and fishing licenses, by Section 5967. See also Sec. 5501, Remington's Compiled Statutes of Washington.

The county is a municipal corporation and agency of the State. Article XI, State Constitution, Sections 4 and 12. *Lincoln County vs. Brock*, 37 Wash. 14-16. The officers [27] of the county and their duties, it is provided in the Constitution, are to be prescribed by the State Legislature. Article XI, Section 5. This section, in part, provides:

* * * * *

“And it” (State legislature) “shall provide for the strict accountability of such officers for all fees which may be collected by them, and for all public moneys which may be paid to them, or officially come into their possession.”

Bonds of county officers are made to the State. Section 9930, Remington's Compiled Statutes of Washington.

That a county is an agency of the State has been decided both by the courts of the State and the United States. *Rogers Locomotive Works vs. Emigrant Co.*, 164 U. S. 559-576; *State of Washington ex rel Board of Commissioners vs. Clausen*, 95 Wash. 214. It is because of this fact that Federal income taxes on municipal bonds have been held unconstitutional. *Pollock vs. Farmer's Loan and Trust Company*, 157 U. S. 429.

A county officer is one by whom the county performs its functions. *Sheboygan Co. vs. Parker*, 3 Wal. 93 (70 U. S.).

While the auditor may have been in one sense the agent of the State and of Clarke and Skamania counties in these matters, he was also the agent of Cowlitz county, which, in a broader sense, was the State's agent. The county determines what is suitable and necessary in the furnishing and equipping of the office in which the auditor must discharge his duties, including those of collecting and keeping public funds. Sections 4032 and 4056, Remington's Revised Statutes of Washington.

While as between the county and the State the

funds in question belonged to the State,—as between the county and the bank, at the time they were received by the bank, they were also county funds. [28]

Concerning the second question as to whether the transaction described was a “deposit”, it may be conceded that were the transaction one between the bank and the ordinary bank customer with a checking account therein it would not, under the circumstances, be a deposit, *Reynes vs. Dumont*, 130 U. S. 354, but in view of the strict accountability to which county officers are held in handling public money and particularly in view of the constitutional provision above quoted, these funds were “deposited with the bank”. Upon their delivery by the auditor to the bank, title passed to the bank and the bank became the debtor in case of non-payment of the draft—a debtor subject to suit either by the county or its auditor when paid by them. Such drafts of the bank, insofar as effect and principle are concerned, were not essentially different from demand certificates of deposit.

Judgment will be for defendants.

So concluding, discussion of other questions argued is not necessary.

Any findings, conclusions and judgment herein will be settled upon notice.

The Clerk will notify the attorneys for the parties of the foregoing decision.

[Endorsed]: Filed Jan. 3, 1933. Ed. M. Lakin, Clerk. By E. R., Deputy. [29]

[Title of Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

BE IT REMEMBERED, That on the 7th day of October, 1932, the above entitled cause came regularly on for trial before the above entitled Court, plaintiffs appearing in person and by attorney, and defendants appearing in person and by attorney, and the court having heard and considered the evidence, both oral and documentary, introduced and received on the trial of said cause by the parties plaintiff and defendant, and the arguments of counsel for the respective parties thereon, and the Court being advised in the law and the premises, makes the following:

FINDINGS OF FACT.

I.

That the First National Bank of Kelso, Washington, at all times mentioned in plaintiff's complaint, was a banking corporation duly organized and existing under and by virtue of the national banking laws of the United States of America and that on the 23rd day of December, 1931, said bank was closed and placed in charge of the Comptroller of Currency of the United States; that on the 29th day of December, 1931, E. B. Benn, was by the Comptroller of Currency of the United States of America duly appointed receiver of the First National Bank of Kelso, Washington, and immediately qualified as such receiver and took possession of said bank, its assets and property and is and

was at all times mentioned in plaintiff's complaint, the duly appointed, qualified and acting receiver of and for said bank, and was duly authorized to begin and prosecute the above entitled cause.

II.

That the above named defendant J. G. Gruver was at all times mentioned in plaintiff's complaint, the duly elected, qualified [30] and acting auditor of Cowlitz County, State of Washington; and that the defendant, The American Surety Company of New York, a corporation, was at all times mentioned in plaintiff's complaint, the bondsman on defendant Gruver's official bond as such county auditor, which said bond was, at all times mentioned in plaintiff's complaint in full force and effect.

III.

That the said defendant J. G. Gruver in the course of his official duties as county auditor of Cowlitz County, Washington, was required to and did collect certain moneys belonging to said Cowlitz County, consisting of marriage license fees, and fees for hunting and fishing licenses for said county, and that these monies thus collected are the only monies belonging to Cowlitz County which the defendant Gruver retained in his possession.

IV.

That the said defendant Gruver as county auditor was also required to and did receive applications for motor vehicle licenses for the State of Washington, and on behalf of the state collected the fees

for such licenses at the time applications were made, for the same, and in addition to the amount of the license fees thus paid, the auditor charged a fee of twenty-five cents for each application, and that such additional fee thus charged belonged to said Cowlitz County to be turned over to the county treasurer of said county; that in receiving applications and collecting the fees for motor vehicle licenses, the said defendant Gruver acted as agent for the State of Washington and the funds so received by him belonged to the State of Washington and were to be remitted daily to the state treasurer of said state.

V.

That the defendant Gruver as part of his official duties [31] as county auditor, at all times mentioned in plaintiff's complaint, issued hunting and fishing licenses for other counties throughout the State of Washington and the fees thus received for such licenses belonged to such other counties and were remitted to said counties at varying intervals, and where the funds received for such licenses were not remitted immediately, the same were held in the office of the said county auditor of Cowlitz County until the remittances were made.

VI.

That at all times set out in plaintiff's complaint, the said defendant Gruver as county auditor had two checking accounts in the plaintiff bank; one called trust fund account in which only monies received from marriage license fees were deposited

and the other called the game fund account, in which only funds received for hunting and fishing licenses from Cowlitz County were deposited, and these two accounts constituted the only accounts that the defendant Gruver had in said bank.

VII.

That for a period of at least six months prior to the closing of said plaintiff bank, it was the custom of said defendant Gruver, as county auditor, to make the remittances of automobile license fees to the state treasurer by draft drawn by the plaintiff bank on the First National Bank of Seattle, and that the remittances to other counties for hunting and fishing licenses issued for such other counties were likewise made by drafts drawn by the plaintiff bank upon other banks.

These drafts were in every instance purchased by the defendant Gruver as county auditor of Cowlitz County and paid for in currency, silver and checks at the time the same were [32] issued, and that in no instance were any of such drafts purchased or paid for out of the funds which had been on deposit in the bank and in no instance were any of the motor vehicle license funds or outside county hunting and fishing license funds deposited in the bank except the currency, silver or checks deposited by said auditor at the time of receiving the plaintiff bank's draft for same.

VIII.

That during the period from April 1, 1931, to October 1, 1931, the daily balance which said defendant Gruver as auditor had on deposit with said

plaintiff bank in the game fund amounted to from \$800.00 to \$1,800.00 and the average daily balance in said bank in the trust fund account amounted approximately forty dollars.

IX.

That on the 9th day of April, 1931, the plaintiff bank turned over to the defendant Gruver certain school warrants of the total face value of \$1503.98 and the terms and conditions under which said school warrants were turned over to the defendant were set forth in a written instrument which reads as follows:

“Office of

J. G. Gruver,

County Auditor,

Court House,

Kelso, Washington.

April 9th, 1931.

RECEIVED of The First National Bank, Kelso, Washington, as security for Cowlitz County funds deposited by me, and to be deposited by me, in such bank, various School District warrants as follows:

School Dist. No.	Warrant No.	Bank's No.	Amount
127	6	2119	\$125.00
127	10	2123	123.00
127	16	2122	175.00
127	17	2125	143.00
127	26	2130	150.00
127	29	2137	123.00
127	34	2132	100.25

School Dist. No.	Warrant No.	Bank's No.	Amount
127	40	2153	116.75
127	47	2120	111.00
127	54	2126	87.75
127	64	2146	99.00
127	67	2124	99.00
127	81	2121	10.00
127	108	2151	41.23

Total—Fifteen Hundred Three & 98/100

Dollars

\$1,503.98

Dated at Kelso, Washington, April 9th, 1931.

(Sig) J. G. Gruver, County Auditor.

It being agreed by and between said plaintiff bank and said defendant Gruver that such warrants were to protect all funds coming into his hands as County Auditor and deposited by him in said bank as such auditor.

X.

That on December 17, 1931, the defendant Gruver as auditor purchased from the plaintiff bank a draft on the First National Bank of Seattle, in the sum of \$10.50 payable to the auditor of Skamania county, Washington, and a similar draft in the sum of \$1.50 payable to the auditor of Clark county, Washington; and that these drafts were paid for in cash and represented funds received by the defendant Gruver for hunting and fishing licenses issued by him for Skamania and Clark Counties respectively.

XI.

That on December 21, 1931, the defendant Gruver had on hand the sum of \$833.00 in the form of silver, currency and checks which had been received by him as auditor in payment of automobile license fees for the state of Washington, and on that date he purchased from the plaintiff bank two drafts drawn on the First National Bank of Seattle and payable to the treasurer of the state of Washington, one being for the sum of \$533.00, and the other for the sum of \$300.00, and that these drafts were paid for by the said defendant Gruver in silver, currency and checks. [34]

That at all times the various drafts herein mentioned were issued, plaintiff bank had sufficient funds or credit in the First National Bank of Seattle to pay the same and the same would have been paid had it not been for the closing of plaintiff bank prior to the time the drafts were presented for payment.

XII.

That the last date upon which plaintiff bank did business was December 22, 1931, and that the Comptroller of Currency of the United States took charge of the bank on the morning of the 23rd day of December, 1931, for the purpose of liquidation, and that at the time of the closing of said bank as aforesaid, the defendant Gruver as auditor had on deposit in the said bank in the trust fund account and in the game fund account a total balance of \$57.71 together with interest thereon amounting to \$.70 making a total of \$58.41.

XIII.

That after the closing of the plaintiff bank and on or about the 28th day of December, 1931, the defendant Gruver, as auditor, sold the school warrants which had been deposited with him receiving in payment therefor the sum of \$1568.59, and after deducting therefrom the amount represented by the balance of his deposit in the trust fund and game fund accounts together with the amount of the drafts herein referred to, tendered the balance amounting to the sum of \$680.38 to the Examiner in charge of plaintiff bank, which tender was refused by the Examiner and demand made upon the defendant Gruver for the sum of \$1510.18, being the balance of the proceeds of said warrants after deducting therefrom the amount of the balances in the trust and game accounts at the time of the closing of said plaintiff bank, And that after the commencement of this action, the said defendant Gruver as auditor has tendered into [35] Court the sum of \$680.38, the same having been paid to plaintiff pursuant to the terms of the stipulation entered into between the parties, and the funds received by said auditor from said bank immediately co-mingled with the bank's other funds.

Done at Tacoma this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,
Judge.

From the foregoing facts found, the court concludes as follows:

CONCLUSIONS OF LAW.

I.

That the said defendant J. G. Gruver was acting as an officer and agent of Cowlitz County, Washington, at the time he collected and received the fees referred to and set out in the Findings of Fact herein, and that as between the State of Washington and the Counties of Clark and Skamania, the monies thus collected by the said defendant Gruver belonged to the State of Washington or to the Counties of Clark and Skamania according to their respective rights as between Cowlitz County and plaintiff bank at the time they were received by plaintiff bank, they were county funds of said Cowlitz County.

II.

That in purchasing the drafts, referred to in the Findings of Fact herein set out, by the said defendant Gruver as auditor of said county, and paying for same with funds representing license fees collected by said defendant Gruver as such county auditor, such funds were deposited with said plaintiff bank upon the delivery of same to said bank and title thereto passed to said plaintiff bank and said bank became a debtor of Cowlitz County in the event of the non-payment of the draft or drafts issued by said plaintiff bank.

III.

That defendant Gruver as county auditor had the right to sell the school warrants deposited with him by plaintiff bank and to deduct from the proceeds received from such sale monies on deposit in said plaintiff bank belonging to Cowlitz County deposited therein by said defendant Gruver as County Auditor and to deduct therefrom the face value of the several drafts referred to in the Findings of Fact herein and to pay the balance of such monies received from the balance of said school warrants to the person or persons in charge of the affairs of said plaintiff bank lawfully entitled to receive same, and that such payment has been made by said defendant Gruver pursuant to a stipulation on file herein.

IV.

That defendants are entitled to a judgment of dismissal herein with costs taxed in their favor. [36]

Done at Tacoma, this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,

Judge.

Due and timely service of the foregoing Findings of Fact and Conclusions of Law acknowledged and true copy thereof received this 17th day of February, 1933.

JOHN F. McCARTHY,

of Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 13, 1933. Ed. M. Lakin, Clerk. By E. R., Deputy. [37]

In the United States District Court for the Western
District of Washington, Southern Division.

No. 8261

THE FIRST NATIONAL BANK OF KELSO,
WASHINGTON, a corporation, by E. B.
BENN, its Receiver,

Plaintiff,

vs.

J. G. GRUVER, and THE AMERICAN SURETY
COMPANY OF NEW YORK, a corporation,
Defendant.

JUDGMENT.

BE IT REMEMBERED: That on the 7th day of October, 1932, the above entitled cause came regularly on for trial before the above entitled court, plaintiffs appearing in person and by attorney, and defendants appearing in person and by attorney, and Court having heard and considered the evidence, both oral and documentary, introduced and received on the trial of said cause by the parties plaintiff and defendant, and the arguments of counsel for the respective parties thereon, and the Court having heretofore made, filed and entered its Findings of Fact and Conclusions of Law, which Findings of Fact and Conclusions of Law are hereby specifically referred to and by reference made a part hereof, and the court being advised in the law and the premises;

It is by the court CONSIDERED, ORDERED,

ADJUDGED AND DECREED that the above entitled action be and the same is hereby decreed to be dismissed with costs in favor of defendants to be taxed according to law.

Done at Tacoma this 13th day of March, A. D. 1933.

EDWARD E. CUSHMAN,
Judge.

Due and timely service of the foregoing Judgment acknowledged and true copy thereof received this 17th day of February, 1933.

JOHN F. McCARTHY
of Attorneys for Plaintiff. [38]

K

TREASURY DEPARTMENT

Washington

#8261

Comptroller of the Currency

Address reply to

“Comptroller of the Currency”

Mr. E. B. Benn, Receiver,

The First National Bank,

Kelso, Washington.

Dear Sir:

This office acknowledges receipt of a letter dated May 4, 1933, addressed to the Comptroller of the Currency from Fisk and McCarthy, Esquires, attorneys for the First National Bank trust, respecting the appeal authorized by telegram dated January

18th, 1933, of the litigation of your trust against Cowlitz County Auditor.

Your attorneys request that the Comptroller of the Currency file a certificate stating that the appeal is taken under and by virtue of the express direction of the Comptroller. It is not usual for the Comptroller of the Currency to file certificates in matters of this kind in the various Federal Courts throughout the United States, since the letter of the Comptroller may be filed in Court as a part of the record. Accordingly, the Comptroller of the Currency hereby instructs and directs you as receiver of the insolvent First National Bank of Kelso, Washington, to note and perfect an appeal from the decision of the trial court filed January 3rd, 1933, in the litigation titled "First National Bank of Kelso, Washington, a corporation, by E. B. Benn, its Receiver, plaintiff, vs. J. G. Gruver and The American Surety Company of New York, a corporation, defendants." and you are directed to instruct your attorneys to take appropriate steps for the perfection of such appeal in the United States Circuit Court of Appeals and to vigorously prosecute the appeal in that Court.

Yours very truly,

F. G. AWALT (Signed)

Deputy Comptroller.

[Endorsed]: Filed Jun. 12, 1933. Ed. M. Lakin, Clerk. By E. W. Pettit, Deputy. [39]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER
ALLOWING APPEAL.

COMES NOW the plaintiff and feeling aggrieved at the judgment of the above-entitled Court made and entered on the 13th day of March, 1933, does hereby appeal from said judgment, and each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in its assignment of errors filed herein, and said plaintiff prays that its appeal be allowed and citation issued as provided by law and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Ninth Circuit as by law and the Rules of Court provided.

H. P. FISK

JOHN F. McCARTHY

Attorneys for plaintiff.

ORDER ALLOWING APPEAL.

Upon application of the plaintiff, it is

HEREBY ORDERED that the appeal of the plaintiff, The First National Bank of Kelso, Washington, a corporation, by E. B. Benn, its Receiver, to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment herein made and entered on the 13th day of March, 1933, be, and the same is hereby allowed, and it is further ordered that inasmuch as said appeal has been taken under

and by virtue of the express direction of the Comptroller of the Currency of the United States of America said plaintiff be not required to furnish any bond on such appeal.

Done in open Court this 12th day of June, 1933.

EDWARD E. CUSHMAN

Judge.

[Endorsed]: Filed Jun. 12, 1933. Ed. M. Lakin, Clerk. By E. W. Pettit, Deputy. [40]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS ON APPEAL

Comes now the plaintiff and hereby submits its assignment of errors in the above entitled matter, as follows:

I.

That the court erred in ruling in paragraph numbered I of its conclusions of law that the defendant, J. G. Gruver, was acting as an officer and agent of Cowlitz County, Washington at the time he collected and received the fees for automobile licenses referred to in the findings of fact herein and in ruling that said fees and the fees collected by said defendant for hunting and fishing licenses for the counties of Clark and Skamania were Cowlitz County funds.

II.

That the court erred in ruling in paragraph numbered II of its conclusions of law that the purchase

of the drafts referred to in the findings of fact herein constituted a deposit in the plaintiff's bank.

III.

That the court erred in ruling in paragraph numbered III of its conclusions of law that the defendant, J. G. Gruver had the right to sell the school warrants deposited with him by plaintiff bank and to deduct from the proceeds received therefrom the face value of the several drafts referred to in the findings of fact herein.

IV.

That the Court erred in entering a judgment in favor of the defendants.

T. P. FISK

JOHN F. McCARTHY

Attorneys for Plaintiff

[Endorsed]: Filed Jun. 12, 1933. Ed. M. Lakin, Clerk. By E. W. Pettit, Deputy. [41]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the United States District Court of
Western District of Washington, Southern Division:

Please prepare and immediately transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a transcript of the record in the above-entitled cause as follows:

1. Complaint.
2. Answer of defendant, J. G. Gruver.
3. Answer of defendant, The American Surety Company of New York, a corporation.
4. Reply to answer of defendant, J. G. Gruver.
5. Reply to answer of defendant, The American Surety Company of New York, a corporation.
6. Waiver of trial by jury.
7. Court's memorandum decision.
8. Findings of Fact and Conclusions of Law.
9. Judgment.
10. Letter from Comptroller of the Currency of the United States directing appeal.
11. Petition for appeal and order allowing appeal.
12. Assignment of Errors.

T. P. FISK

JOHN F. McCARTHY

Attorneys for plaintiff.

Service by copy of the foregoing praecipe is hereby accepted this 16th day of June, 1933.

CECIL B. HALLIN,

of Attorneys for defendant

J. G. Gruver. [42]

Service by copy of the foregoing praecipe is hereby accepted this 15th day of June, 1933.

J. E. STONE

Attorneys for the defendant

The American Surety Company

of New York, a corporation.

[Endorsed]: Filed Jun. 17, 1933. Ed. M. Lakin,
Clerk. By. E. Redmayne, Deputy. [43]

[Title of Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript of record consisting of pages numbered from 1 to 43 both inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in the case of *The First National Bank of Kelso, Washington, a corporation, by E. B. Benn, Its Receiver, Plaintiff and Appellant vs. J. G. Gruver and The American Surety Company of New York, a corporation, Defendants and Appellees*, cause No. 8261, in said court as required by praecipe of counsel filed and of record in my office in said Court at Tacoma, and that the same constitutes the record on appeal from the judgment of said United States Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred and paid by and on behalf of the appellant herein in the preparation of this transcript, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee,	\$ 5.00
Clerk's fee (Act Feb. 11, 1925) for making record 130 folios @ 15¢ per folio,	19.50
Clerk's certificate,50
	<hr/>
	\$25.00

I do further certify that the cost of preparing record on appeal amounting to \$25.00 has been paid to me by the appellant.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of Tacoma, in the Western District of Washington, this 1st day of August, 1933.

[Seal]

ED. M. LAKIN, Clerk.

By E. W. Pettit, Deputy. [44]

[Endorsed]: No. 7243. United States Circuit Court of Appeals for the Ninth Circuit. The First National Bank of Kelso, Washington, a corporation, by E. B. Benn, its Receiver, Appellant, vs. J. G. Gruver, and The American Surety Company of New York, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed August 3, 1933.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

